

No. 1-13-1133

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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CRAIG BAUMGARTEN, ROSS BAUMGARTEN, and KAREN SUNDHEIM,	)	Appeal from the
	)	Circuit Court of
	)	Cook County.
Plaintiffs-Appellants,	)	
	)	No. 10 L 013126
v.	)	
	)	
KATTEN MUCHIN ROSENMAN, LLP,	)	
and CHARLES HARRIS,	)	Honorable
	)	Sanjay T. Taylor,
Defendants-Appellees.	)	Judge Presiding.

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PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.  
Justices Hall and Lampkin concurred in the judgment.

**ORDER**

*Held:* We affirmed the dismissal of plaintiffs' legal malpractice action where it failed to state a cause of action.

¶ 1 Plaintiffs, Craig Baumgarten, Ross Baumgarten, and Karen Sundheim, appeal the order of the circuit court dismissing their legal malpractice action against defendants, Katten Muchin Rosenman, LLP, and Charles Harris, for failure to state a cause of action. Plaintiffs contend the circuit court erred in finding that they had failed to adequately plead facts showing that defendants committed legal malpractice by negligently drafting a trust document that had the effect of decreasing their inheritance. We affirm.

¶ 2 Robert L. Baumgarten (Mr. Baumgarten) died in February 2010 and was survived by his wife of over 40 years, Marlene (Mrs. Baumgarten), and five adult children, two by Mrs. Baumgarten, and three, the plaintiffs-appellants, from a prior marriage.

¶ 3 Years before his death, Mr. Baumgarten created the Robert L. Baumgarten Revocable Trust (the Trust) with himself as trustee. Mrs. Baumgarten was subsequently named co-trustee of the Trust.

¶ 4 In July 2009, Mr. and Mrs. Baumgarten, with the advice and assistance of defendant Charles Harris (Mr. Harris), executed a Fifth Restatement of the Trust ("the Fifth Restatement"). The Fifth Restatement provided that upon Mr. Baumgarten's death, some of the Trust assets were to be transferred to a marital trust for the benefit of Mrs. Baumgarten and the remaining assets from the Trust were to be held in a residuary trust for the benefit of Mrs. Baumgarten during her lifetime. The Fifth Restatement further provided that, upon Mrs. Baumgarten's death, any remaining assets in either the marital trust or the residuary trust would be distributed *per stirpes* to Mr. Baumgarten's then-living descendants. The Fifth Restatement designated Mrs. Baumgarten and Mr. Harris to be the co-trustees of both the marital trust and the residuary trust.

¶ 5 Under the terms of the Fifth Restatement, Mr. Harris, as co-trustee, has the power, during Mrs. Baumgarten's lifetime, to "distribute \*\*\* all or any part" of the principal of the marital trust and/or the residuary trust to Mrs. Baumgarten to the extent that Mr. Harris "deems desirable for the best interests" of Mrs. Baumgarten. The Fifth Restatement specifically stated that it was Mr. Baumgarten's wish that the term "best interests" be "liberally construed" to include the "possibility of distributions for \*\*\* her comfort, convenience and happiness."

¶ 6 On October 6, 2009, Mr. Baumgarten wrote a letter explaining his intentions regarding his new estate plan to his daughter, Karen Sundheim, one of the plaintiffs-appellants here. The letter stated in pertinent part:

"1. My various investments have incurred substantial losses in the recent market downturn and my net worth has substantially decreased.

2. As a result of these losses, I have revised my estate plan such that all of my property will be left in trust for my spouse, Marlene G. Baumgarten ('Marlene'), upon my death. My intent in amending my estate plan is to ensure that Marlene is fully provided for during her lifetime.

3. The assets left in trust for Marlene will be held for her benefit. The Trustee will be authorized to make distributions to Marlene on a broad 'best interests' standard. It is my intent to fully provide for Marlene during her lifetime. It is possible that the entire trusts held for Marlene could be fully utilized to provide for Marlene during her lifetime. The Trustees will be authorized to deplete all trust funds if they feel it is appropriate in order to provide for Marlene.

4. Upon Marlene's death, the then remaining trust assets, if any, will be distributed *per stirpes* to my then living descendants. Generally speaking, this means that one equal share will be created for each of my five children and each share will be retained in trust for their benefit.

5. The amendment to my estate plan is not intended to convey any loss of love or affection for my children. It merely reflects the change in my economic circumstances and my concern over adequately providing for Marlene."

¶ 7 Mr. Baumgarten died in February 2010. Under a will he executed contemporaneously with the Fifth Restatement, all of Mr. Baumgarten's assets, other than certain personal effects, were transferred to the Trust for distribution according to the terms of the Trust.

¶ 8 In November 2010, plaintiffs filed a one-count complaint alleging that defendants Mr. Harris and his law firm, Katten Muchin Rosenman, LLP, had committed legal malpractice in the preparation of the Fifth Restatement in that the Fifth Restatement did not reflect Mr. Baumgarten's intentions, as expressed in his October 6, 2009, letter (Letter), to provide for and preserve plaintiffs' inheritance. Specifically, the complaint alleged that the Fifth Restatement did not reflect Mr. Baumgarten's intentions as expressed in the Letter because: (1) the Fifth Restatement permitted the co-trustees to distribute all or any part of the residuary of the Trust to Mrs. Baumgarten for her best interests; (2) the Fifth Restatement did "not prevent but in fact facilitate[d] [Mrs. Baumgarten's] ability to obtain all the residuary of the Trust and subsequently devise all the residuary of the Trust to her heirs as opposed to [p]laintiffs"; and (3) the Fifth Restatement did not restrict Mrs. Baumgarten's interest in Mr. Baumgarten's estate plan to a life estate with no power on the part of the co-trustees to sell the Trust assets. Plaintiffs attached as exhibits to the complaint a copy of the Fifth Restatement and the Letter.

¶ 9 Defendants filed a motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2012)), arguing that there was no material difference between the actual terms of the Fifth Restatement and the Letter and, thus, that plaintiffs' complaint for legal malpractice failed to state a cause of action. The circuit court agreed and granted the motion to dismiss due to the lack of any inconsistency between the Letter and the Fifth Restatement. The circuit court granted plaintiffs leave to file an amended complaint, but plaintiffs chose to stand on their original complaint. The circuit court subsequently entered an

order dismissing plaintiffs' complaint with prejudice pursuant to section 2-615 of the Code<sup>1</sup>. Plaintiffs appeal.

¶ 10 "[T]he question presented by a section 2-615 motion to dismiss is whether the allegations of the complaint, when viewed in the light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted. [Citation.] Illinois is a fact-pleading jurisdiction that requires a plaintiff to file both a legally and factually sufficient complaint. [Citation.] When ruling on a section 2-615 motion to dismiss, the circuit court must admit all well-pleaded facts as true and disregard any legal and factual conclusions that are unsupported by allegations of fact." *Illinois Insurance Guaranty Fund v. Liberty Mutual Insurance Co.*, 2013 IL App (1st) 123345, ¶ 14. Any exhibits attached to the complaint are considered part of the pleading. *Faison v. RTFX, Inc.*, 2014 IL App (1st) 121893, ¶ 27. The standard of review on a section 2-615 dismissal is *de novo*. *Illinois Insurance Guaranty Fund*, 2013 IL App (1st) 123345 at ¶ 14.

¶ 11 "The elements of a legal malpractice action are: (1) the existence of an attorney-client relationship that establishes a duty on the part of the attorney; (2) a negligent act or omission constituting a breach of that duty; (3) proximate cause; and (4) damages." *Orzel v. Szewczyk*, 391 Ill. App. 3d 283, 290 (2009). In the present case, defendants do not dispute that plaintiffs properly pleaded the existence of an attorney-client relationship establishing a duty on the part of defendants toward plaintiffs, or that plaintiffs suffered damages. Rather, defendants' only argument in the circuit court and on appeal is that plaintiffs failed to adequately plead that defendants committed a negligent act or omission constituting a breach of duty.

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<sup>1</sup> Meanwhile, plaintiffs filed a petition in the circuit court to set aside Mr. Baumgarten's will and Trust as a product of Mrs. Baumgarten's undue influence. The circuit court dismissed the petition with prejudice, and we affirmed. *In re Estate of Baumgarten*, 2012 IL App (1st) 112155.

¶ 12 We proceed to examine plaintiffs' complaint to determine whether they adequately pleaded negligence on the part of defendants. As discussed earlier in this order, plaintiffs' complaint alleged that defendants were negligent in failing to prepare the Fifth Restatement in accordance with Mr. Baumgarten's intentions, as expressed in the Letter, to preserve plaintiffs' inheritance. The complaint set out three specific instances where the Fifth Restatement was allegedly at odds with Mr. Baumgarten's intentions as set forth in the Letter.

¶ 13 First, according to the complaint, defendants were negligent in drafting the Fifth Restatement to allow the co-trustees to "distribute all or any part of the residuary of the Trust to [Mrs. Baumgarten] for [her] best interests." However, we find this was in no way inconsistent with Mr. Baumgarten's intentions as set forth in the Letter, as the Letter stated it was Mr. Baumgarten's intent that: "all of [his] property" be left in trust for Mrs. Baumgarten; that the co-trustees "will be authorized to make distributions to [Mrs. Baumgarten] on a broad 'best interests' standard"; that "[i]t is possible that the entire trusts held for [Mrs. Baumgarten] could be fully utilized to provide for [her] during her lifetime"; and that the co-trustees "will be authorized to deplete all trust funds if they feel it is appropriate in order to provide for [Mrs. Baumgarten]." Accordingly, as defendants' drafting of the Fifth Restatement to allow the co-trustees to distribute all or any part of the residuary of the Trust to Mrs. Baumgarten for her best interests was in accordance with Mr. Baumgarten's stated intention in his Letter, plaintiffs failed to adequately plead negligence on the part of defendants and, therefore, this claim of legal malpractice fails.

¶ 14 Second, according to the complaint, defendants were negligent in drafting the Fifth Restatement to "facilitate[] [Mrs. Baumgarten's] ability to obtain all the residuary of the Trust and subsequently devise all the residuary of the Trust to her heirs as opposed to [p]laintiffs."

However, as discussed in the immediately preceding paragraph, we find that the Fifth Restatement's facilitation of Mrs. Baumgarten's ability to obtain all the residuary of the Trust was in no way inconsistent with Mr. Baumgarten's intentions as set forth in the Letter. Further, contrary to the allegations of the complaint that the Fifth Restatement facilitated Mrs. Baumgarten's ability to devise all the residuary of the Trust to her heirs as opposed to plaintiffs, the Fifth Restatement specifically provided that upon Mrs. Baumgarten's death, the co-trustee shall distribute the remaining Trust assets *per stirpes* to Mr. Baumgarten's then-living descendants (which would include the plaintiffs here). Where the allegations in the complaint conflict with an exhibit (here, the Fifth Restatement) attached to the complaint, the exhibit controls and the motion to dismiss does not admit allegations conflicting with the facts disclosed in the exhibit. *Kanfer v. Busey Trust Co.*, 2013 IL App (4th) 121144, ¶ 63. Accordingly, as defendants' drafting of the Fifth Restatement to facilitate Mrs. Baumgarten's ability to obtain the residuary of the Trust and to provide after her death for the distribution of the remaining Trust assets was consistent with Mr. Baumgarten's stated intentions in his Letter, plaintiffs failed to adequately plead negligence on the part of defendants and, therefore, this claim of legal malpractice fails.

¶ 15 Third, according to the complaint, defendants were negligent by failing to draft the Fifth Restatement so as to restrict Mrs. Baumgarten's interest in Mr. Baumgarten's estate plan to a life estate and provide the "protection for [p]laintiffs that was the stated intention of [Mr. Baumgarten]" in his Letter. Plaintiffs contend this allegation states a cause of action for legal malpractice pursuant to *Thomas v. First National Bank of Chicago*, 134 Ill. App. 3d 192 (1985). In *Thomas*, Mr. and Mrs. Thomas executed a joint and mutual "Last Will and Testament" providing that all of their property was to pass to the survivor, and upon the death of the

survivor, the residue of their property was to pass in equal shares to their children, the plaintiffs. *Id.* at 196-97. Mr. Thomas died and the will was admitted to probate. *Id.* at 197. The plaintiffs subsequently filed a complaint for a declaratory judgment that Mrs. Thomas had only a life estate in the property and was subject to the duties of a life tenant to account for the property and not to waste, mismanage or dissipate the property. *Id.* at 197-98. Mrs. Thomas filed a motion for summary judgment arguing that the will gave her full power to sell or transfer the property so long as she did not waste, mismanage, or dissipate the property or do anything with any part thereof that was contrary to the intent of the will. *Id.* at 201. In pertinent part, the circuit court granted summary judgment for Mrs. Thomas, finding she had full power to sell, convey, invest and reinvest the property. *Id.* at 194-95. On appeal, the *Thomas* court held that when a testator grants a life estate providing that the "then remaining" property passes to a third party upon the life estate tenant's death, no power of sale is vested in the life estate tenant. *Id.* at 207. The reasoning is that words such as "then remaining" serve to dispose of the remainder interest in the property. *Id.*<sup>2</sup>.

¶ 16 Plaintiffs here argue that since the Letter provided that the "then remaining" trust assets will be distributed to Mr. Baumgarten's descendants upon Mrs. Baumgarten's death, Mr. Baumgarten's intent was that defendants were to provide in the Fifth Restatement that Mrs. Baumgarten's interest in his estate plan was restricted to a life estate with no power on the part of the co-trustees to sell any of the Trust assets. Plaintiffs contend defendants committed legal malpractice by failing to so draft the Fifth Restatement to restrict Mrs. Baumgarten's interest in the estate plan to a life estate with no power on the part of the co-trustees to sell the Trust assets.

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<sup>2</sup> The *Thomas* court held, though, that plaintiffs there waived any argument on appeal that the life estate interest did not include the power of sale of the property where they agreed and acquiesced in the trial court's finding that Mrs. Thomas possessed the power to sell the property. *Id.* at 209-13.



We disagree. The provision in the Letter providing for the distribution of the "then remaining" Trust assets, "if any," upon Mrs. Baumgarten's death cannot be read in isolation, but must be considered alongside the entirety of the Letter when construing Mr. Baumgarten's intent. See *Wachta v. First Federal Savings and Loan Association of Waukegan*, 103 Ill. App. 3d 174, 181 (1981). As discussed earlier in this order, the clear language of the Letter expressed Mr. Baumgarten's intent that the assets in the Trust be used to "fully provide" for Mrs. Baumgarten during her lifetime and expressly authorized the co-trustees to "deplete all [T]rust funds" and utilize the "entire" Trust if they felt it necessary to provide for her. By authorizing the co-trustees to deplete all Trust funds and utilize the entire Trust in order to provide for Mrs. Baumgarten during her lifetime, Mr. Baumgarten was expressing his intent that the co-trustees could sell Trust assets as necessary to provide for her. The provision in the Letter providing, upon Mrs. Baumgarten's death, for the distribution of the "then remaining" Trust assets, "if any," was only to take effect in the event the entire Trust was not depleted and/or all Trust assets were not sold. Accordingly, as defendants' drafting of the Fifth Restatement to allow the co-trustees to sell Trust assets was in accordance with Mr. Baumgarten's stated intention in his Letter, plaintiffs failed to adequately plead negligence on the part of defendants and, therefore, this claim of legal malpractice fails.

¶ 17 In conclusion, plaintiffs' legal malpractice action was premised on the allegation that defendants were negligent in failing to prepare the Fifth Restatement in accordance with Mr. Baumgarten's intentions, as expressed in the Letter, to preserve plaintiffs' inheritance. However, plaintiffs failed to plead any facts showing that the Fifth Restatement conflicted with Mr. Baumgarten's intentions as expressed in the Letter. Accordingly, the circuit court correctly dismissed plaintiffs' legal malpractice action for failure to state a cause of action.

¶ 18 Plaintiffs contend there are factual questions regarding whether defendants were negligent in the drafting of the Fifth Restatement that should be resolved by a jury after hearing expert testimony. However, before getting to a jury, plaintiffs must first state a cause of action for legal malpractice and survive defendants' section 2-615 motion to dismiss. For all the reasons discussed earlier in this order, plaintiffs have failed to state a cause of action for legal malpractice and, therefore, we affirm the dismissal order.

¶ 19 For the foregoing reasons, we affirm the circuit court.

¶ 20 Affirmed.